No. 76-1410

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

JOSEPH V. AGOSTO,
Petitioner,

VS.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 549 F. 2d 806.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1977. A petition for rehearing was denied on March 23, 1977 (Pet. App. iii). The petition for a writ of certiorari was filed on April 12, 1977, and was granted on October 17, 1977. This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 8 U.S.C. 1105a(a)(5) requires proceedings to be transferred to the district court for a *de novo* hearing where the Board of Immigration Appeals, the agency charged with making a final administrative determination of petitioner's nationality claim, has found that his evidence is sufficient, if believed, to support his claim to United States citizenship.

STATUTE INVOLVED

Section 106(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a)(5), provides as follows:

> Whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of Title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise.

STATEMENT

Petitioner claims that he is a United States citizen under the provisions of 8 U.S.C. 1401(a)(1) by virtue of birth in the United States in 1924 (S.R. 547),[1] and that his mother sent him to Italy at the approximate age of 2½ years to live with her sister and brother-in-law (S.R. 331-332, 368-369). It is undisputed that petitioner has lived in the United States since at least the mid-1950's (S.R. 105); that he was married to a United States citizen in 1959 (S.R. 128; Ex. 43; R. 477, S.R. 186, App. 56); and that he is the father of four United States citizen children (S.R. 129, 137, 508; Ex. 43; R. 477, S.R. 186).

The government contends that petitioner is an alien, born in Agrigento, Italy, on or about July 16 or 17 in the year 1927, given the name Vincenzo Di Paola at birth, and later the surname of Pianneti by Pietro and Crocifissa Pianneti, the couple that affiliated him under Italian law in 1943. Its proof consists of documents made many years ago in Italy purporting to show petitioner's birth there. Primarily, the government relies upon two records: (1) a copy of an entry in the Registry of Births for the City of Agrigento, Italy indicating that Vincenzo Di Paola was born on July 17, 1927 to a woman who did not wish to be named and was sent to a foundling home in the custody of a person who declared his birth before the

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[1] "R" refers to the certified administrative record filed in the court below on June 13, 1975. "S.R." refers to the supplemental administrative record filed in the court below on August 22, 1975. Said records are lodged with the clerk of this Court and are partially reproduced in the Appendix.

registrar (Ex. 64; R. 666, S.R. 448), and (2) an annotation from the Registry for the Reception of Foundlings of the Provincial Institute of Assistance to Infancy of Agrigento which recites that Vincenzo Di Paola was consigned on August 26, 1927 to Crocifissa Porrello, wife of Pietro Pianneti (Ex. 65; R. 671, S.R. 474).

Petitioner conceded that he had used the names of Vincenzo Di Paola and Vincenzo Pianneti during his residence in Italy, and that the records produced by the government related to him (S.R. 95; Pet. App. vi). He denied, however, that these records accurately reflect his given name at birth and his date and place of birth (S.R. 94-97). The authenticity of the basic records was challenged by James Witt, who testified that he discovered numerous irregularities on examination of these records in Italy (S.R. 461, 465, 470-471, 499). Pietro Pianneti and his wife, Crocifissa Pianneti, testified that the records ostensibly showing that petitioner was born of unknown parents in Italy, placed in a foundling home, and later consigned to the care of Mrs. Pianneti, had all been "created" by Angelo Porrello, petitioner's maternal grandfather, in order to conceal the fact that his daughter had given birth to an illegitimate child in the United States (S.R. 334-335, 337, 339, 372, 376). Mrs. Pianneti denied that she had ever taken the petitioner from an orphanage (S.R. 512). Petitioner's true origin was never disclosed by Angelo Porrello or the Piannetis to other relatives or friends in Italy (S.R. 336, 376).

The testimony of Pietro Pianneti (S.R. 323-363; 444-456) and Crocifissa Pianneti (S.R. 363:391; 511-515) directly supported the petitioner's claim that he was born in the United States. Both testified that Mrs. Pianneti's sister, Angela or Angelica Porrello, was married in Italy to a Salvatore Santa Maria, and that she had two daughters born in Italy as issue of this marriage (S.R. 328, 385, 390, 451). She departed from Italy in the early 1920's to take up residence in the United States (S.R. 328, 365). Thereafter, she lived in Ohio until her death in about 1937 (S.R. 329, 367). Over the years she corresponded frequently with the Piannetis (S.R. 329, 366). They learned from her letters that she had given birth to three sons in the United States, Angelo Agosto Ripolino, the petitioner, and Carmello Ripolino (S.R. 326-327, 450, 452, 514). These children were all illegitimate, since Angela Porrello never terminated her marriage to Salvatore Santa Maria (S.R. 451). When petitioner was about 2½ years of age, arrangements were made through correspondence between petitioner's mother and Mrs. Pianneti for petitioner to be sent to Italy to live with the Piannetis and Angelo Porrello (S.R. 331, 368). Petitioner arrived in Palermo in 1927 by a ship that came from New York (S.R. 330-331, 368). He was met at the ship by Mr. Pianneti and Angelo Porrello and taken to their home in Licata (S.R. 330, 332).

Petitioner resided with Mr. and Mrs. Pianneti until 1944 (S.R. 384). When he was growing up petitioner often asked the Piannetis about his origin, and they

finally told him he was born in the United States and his mother was Angela Porrello (S.R. 340-341, 379-381). Petitioner then wrote to a relative in the United States in an attempt to obtain proof of his birth here, but neither Mr. Pianneti nor Mrs. Pianneti could testify as to exactly what documents he received pertaining to his birth in the United States (S.R. 341, 381). Mr. Pianneti testified that petitioner returned to the United States in 1951 and that he has since lived in this country (S.R. 342).

Carmen Ripolino testified that he was born in Akron, Ohio, and that his mother's name was Angela Porrello (S.R. 420). As a young boy he was told that his mother was originally from Licata, Sicily and that she had come to the United States in 1922 (S.R. 421, 423-424). He is uncertain as to the identity of his natural father (S.R. 420-421). One of his birth certificates shows that he was born on September 12, 1925, and that his father was Charles Litizia (Ex. 60; R. 662, S.R. 429). Another birth certificate shows his birth date as September 1, 1925 and his father as Giacomo Ripellino (Ex. 61; R. 663, S.R. 429). At certain times he was told that Charles Litizia was his father, and at others that Giacomo Ripolino was his father (S.R. 427). He grew up with an older brother by the name of Agosto Angelo Ripolino, who was born in Akron, Ohio to Angela Porello and believes his father to be Giacomo Ripolino (S.R. 422-423, 427).

When he was very young, Carmen Ripolino's mother told him that he had two half sisters, both of whom had been born in Italy as issue of her marriage

to Santa Maria (S.R. 424, 431). She also told him that he had a half brother, who had been born to her in the United States and later was sent by her to live in Italy (S.R. 424, 431). Carmen Ripolino recalled that his mother often wrote and sent packages to her sister in Italy (S.R. 430). He testified that his mother died on December 20, 1937 (S.R. 422; Ex. 62; R. 664, S.R. 445).

Petitioner last arrived in the United States on or about December 11, 1966, and was then admitted upon presentation of a United States passport (App. 4-5). On September 5, 1967, deportation proceedings were commenced against petitioner by issuance of an order to show cause, charging that he was deportable under Section 241(a)(2) of the Immigation and Nationality Act, 8 U.S.C. 1251(a)(2), as an alien who had entered the United States without inspection (App. 4-6). At a later deportation hearing, an additional charge of deportability under Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251 (a)(1), was lodged against petitioner (App. 21-22). Petitioner denied deportability under both of these charges, contending that as a native born United States citizen he was not amenable to deportation proceedings (S.R. 28-31, 168). 8 U.S.C. 1251.

The immigration judge found the testimony of the Piannetis and Carmen Ripolino not to be credible (App. 39-41). Accordingly, in his decision dated April 11, 1973, he rejected petitioner's claim to citizenship, found petitioner to be a deportable alien, and ordered

that he be deported to Italy (App. 23-59).[5] After summarizing the evidence, the Board of Immigration Appeals concluded that:

> If believed, the testimony of the Piannetis and of Carmen Ripolino clearly refutes the Service's otherwise strong documentary demonstration of the [petitioner's] alienage (Pet. App. viii).

Although the Board of Immigration Appeals acknowledged that the immigration judge misread part of the testimony of the Piannetis and that his opinion failed to fully reflect the potential import of the testimony of Carmen Ripolino, it nevertheless deferred to the immigration judge on the question of credibility, and thus affirmed his decision (Pet. App. iv-xiii).

Petitioner then filed a petition for review, requesting transfer of the proceedings to the United States District Court for a hearing *de novo* pursuant to 8 U.S.C. 1105a(a)(5). On January 24, 1977, the United States Court of Appeals for the Ninth Circuit, with Judge Hufstedler dissenting, rejected petitioner's request for transfer of the proceedings and affirmed the decision of the Board of Immigration Appeals (Pet. App. A).

SUMMARY OF ARGUMENT

I. By its use of summary judgment language in Section 106(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a)(5), which codified the

[5]The immigration judge also denied petitioner various forms of discretionary relief from deportation not at issue here (App. 51-58).

constitutional right of a citizenship claimant to a judicial trial, Congress indicated an intention to reduce the burden of proof required for transfer of proceedings by a court of appeals to a district court from "substantial evidence" to evidence having a "modicum of substantiality" showing "nothing more than the claim not be frivolous."

II. The evidence presented by petitioner in his administrative proceedings entitled him to a judicial determination of his claim of citizenship regardless of the evidentiary standard applied, since it was sufficient, if believed, to support his claim.

III. The court below improperly engaged in the function of weighing and determining the credibility of petitioner's evidence. In this regard, its decision conflicts with the decisions of other circuits which have construed the statute.

IV. The proper scope of review of the administrative record by the lower court in the instant case did not extend beyond the decision of the Board of Immigration Appeals, wherein it was found that petitioner had produced substantial evidence in support of his claim to citizenship. The net effect of the decision below is to sanction final resolution of petitioner's claim, where credibility was the determinative factor, to a hearing officer in the executive department. Hence, the decision contravenes constitutional principles and also violates the express terms of the statute.

ARGUMENT

I

BACKGROUND AND ANALYSIS OF THE STATUTE

In *Ng Fung Ho v. White*, 259 U.S. 276 (1922), this Court held that a resident of the United States who claims to be a citizen has a constitutional right to a judicial trial on the issue of nationality if the evidence produced at his administrative hearing was sufficient, if believed, to support a finding of citizenship. Speaking for the Court, Mr. Justice Brandeis stated the rationale for divesting the executive department of jurisdiction to determine a claim to citizenship, as follows (259 U.S. at pp. 284-285):

> To deport one who so claims to be a citizen obviously deprives him of liberty, as was pointed out in *Chin Yow v. United States*, 208 U.S. 8, 13, 28 Sup.Ct. 201, 52 L.Ed. 369. It may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court.

In later cases reaffirming the rule enunciated in *Ng Fung Ho*, the Court used the term "substantial evidence" with reference to the burden that a citizenship claimant must satisfy in order to be entitled to a *de novo* hearing in district court. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 152 (1923); *Kessler v. Strecker*, 307 U.S. 22, 34, 35 (1939).

The constitutional principle that a claim to citizenship must be judicially rather than administratively determined was codified as 8 U.S.C. 1105a(a)(5) by the enactment of Section 5(a) of the Act of September 26, 1961, P.L. 87-301, 75 Stat. 651. By its terms the statute requires, as a condition to an evidentiary hearing in district court, no more than the showing of a nonfrivolous claim and the existence of a genuine issue of material fact as to nationality. Clause (A) of the statute authorizes a court of appeals to, in effect, grant summary judgment for the government only " * * * when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented."

The close similarity of the language contained in Clause (A) of the statute and language traditionally used in summary judgment statutes suggests that Congress may have intended to relax the evidentiary requirements for obtaining a judicial determination of nationality when it enacted 8 U.S.C. 1105a(a)(5). It can be argued from the terminology employed in the statute that the "sufficient evidence, if believed" or the "substantial evidence" test has been supplanted by a more liberal test requiring only the disclosure of a nonfrivolous claim to American citizenship in the administrative record and the presentation of a genuine issue of material fact in the petition for review filed with the court of appeals. Support for this view can be found in *Pignatello v. Attorney General*, 350 F.2d 719 (C.A. 2, 1965), where the court said (350 F.2d at p. 723):

It is not inconsistent with this principle to require, as the statute does, that there be a *modicum of substantiality* to the claim of citizenship. However, what the petitioner is seeking, and is entitled to, is a *de novo* judicial determination of the claim, not judicial review of the administrative disposition of that claim. Thus what section 106(a)(5) requires, as a condition of a *de novo* judicial determination of the claim of citizenship, is *nothing more than the claim not be frivolous.* * * *

The requirement of subdivision (B) of section 106(a)(5) that a genuine issue of material fact be presented goes, not to whether petitioner is entitled to a *de novo* judicial determination of the claim of citizenship, but to whether this determination is to be made only after an evidentiary hearing in a district court or whether it could be made by the circuit court of appeals on the basis of the pleadings and affidavits. Drawing on the familiar principles relating to summary judgment in the federal courts, the statute permits the circuit court of appeals to determine the claim of citizenship only "when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented". If such an issue does appear, then the proceedings should be transferred to a district court for an evidentiary hearing on this claim of citizenship * * * (emphasis supplied).

The difference between producing evidence in deportation proceedings that may be characterized as "sufficient, if believed" or "substantial" as opposed to evidence having a "modicum of substantiality" showing "nothing more than the claim not be frivolous" is

apparent. The court's interpretation of the statute in *Pignatello* comports with the plain meaning of the words used by Congress and is in accordance with the doctrine that the law should be construed "as far as is reasonably possible in favor of the citizen". *Schneiderman v. United States,* 320 U.S. 118, 122.

II

PETITIONER'S EVIDENCE SATISFIED BOTH THE CONSTITUTIONAL AND THE STATUTORY EVIDENTIARY STANDARDS

Petitioner is entitled to a transfer of the proceedings to a district court regardless of the evidentiary standard applied, since the evidence produced in his administrative proceedings was substantial and was clearly sufficient, if believed, to support his claim to citizenship. The testimony of Pietro Pianneti and his wife, Crocifissa Pianneti, concerning petitioner's origin directly contradicted the documentary evidence relied upon by the government. The Piannetis gave detailed testimony concerning the facts surrounding petitioner's birth and his early upbringing. A good part of their testimony was corroborated by Carmen Ripolino, the petitioner's half brother.

If the testimony of the Piannetis and Carmen Ripolino is accepted as credible, there is no question that petitioner was born in the United States, and that the records purporting to show his birth in Italy were created by his maternal grandfather for the purpose of concealing petitioner's illegitimacy. The petitioner's claim to citizenship was rejected in the

administrative proceedings solely on the basis of the credibility of his witnesses, and not because he failed to produce substantial evidence in support of his claim. The immigration judge concluded that the testimony of the Piannetis was tainted by their interest in the outcome of the issues; that they had failed to come forward and testify at an earlier investigative stage of the proceedings; and that they had been coached as to their testimony (App. 39, 41). Essentially identical reasons were expressed by the immigration judge for not giving credence to the testimony of Carmen Ripolino (App. 30-40).

On appeal, the Board of Immigration Appeals recognized that petitioner had presented substantial evidence supporting his citizenship claim at his deportation hearings and that his claim depended entirely upon the credibility of his witnesses. After discussing the documentary evidence introduced by the government and the testimony of petitioner's witnesses, the Board found that:

> If believed, the testimony of the Piannetis and of Carmen Ripolino clearly refutes the Service's otherwise strong documentary demonstration of the [petitioner's] alienage (Pet. App. viii).

With respect to the issue of credibility, the Board followed the familiar principle of deferring to the immigration judge, who is in the best position, as the administrative trier of fact, to judge the veracity of witnesses (Pet. App. viii). The opinion of the Board leaves no doubt that the administrative disposition of petitioner's claim to citizenship turned on the issue of credibility.

III

THE STATUTE DOES NOT AUTHORIZE THE COURT OF APPEALS TO WEIGH THE EVIDENCE AND DETERMINE ITS CREDIBILITY

The court below mistakenly perceived its function under the statute to include weighing the evidence and determining its credibility. Its reliance upon the substantial evidence standard which was set forth as dictum in *Kessler v. Strecker,* 307 U.S. 22, 35 (1939), decided prior to enactment of 8 U.S.C. 1105a(a)(5), indicates that the court improperly engaged in weighing the evidence adduced in the administrative proceedings. The correct construction given to the statute in *Pignatello v. Attorney General,* supra, limits the court of appeals role to ascertaining whether the administrative record contains a modicum of substantiality to the claim of citizenship and shows that the claim is not frivolous. If this burden has been met, the statute mandates transfer of the proceedings unless the petition fails to present a genuine issue of material fact.

As the dissenting opinion of Judge Hufstedler in the instant case pointed out, the majority of the panel undertook to determine the credibility of petitioner's evidence. This is a task assigned by the statute to the district court where live testimony can be presented and a complete record can be developed. Among those circuits that have had occasion to deal with the statute the Ninth Circuit stands alone in its assumption of the duty of fact finding. In *Rassano v. Immigration and Naturalization Service,* 377 F.2d 971 (C.A. 7, 1967), the claim to citizenship was based upon the

alleged naturalization of the petitioner's deceased father. The only evidence offered by the petitioner was his testimony and the testimony of three members of his family that the petitioner's father had told them that he was a citizen. Neither the petitioner nor his witnesses could testify to having seen the father's naturalization papers or that he had ever voted. Denying transfer, the court said (377 F.2d at pp. 972-973):

> If Rassano's claim of citizenship is supported by evidence sufficient, if believed, to support a finding of citizenship, the executive department had no jurisdiction to pass on that claim. In reviewing the record to determine if it reveals the existence of a genuine issue as to Rassano's claimed citizenship, this court has considered the testimony of petitioner and his three witnesses as credible and in the light most favorable to him. After a thorough search of the record we have found no evidence sufficient to raise a genuine issue as to Rassano's alienage (citation omitted).

In *Tanaka v. Immigration and Naturalization Service*, 346 F.2d 438 (C.A. 2, 1965), an expatriation case decided by a divided court, the sole issue presented was whether *Tanaka* had acted voluntarily when he voted in a Japanese election and had thus lost his American citizenship. The court found that *Tanaka's* act was voluntary as a matter of law. Consequently, no question of material fact was left for resolution by a trial *de novo* before a district court. The majority opinion stated (346 F.2d at p. 440, fn. 4):

> For the purpose of this proceeding, the government accepts Tanaka's testimony as "a truthful

> and sincere account of the reasons underlying his decision to vote in the Japanese political election of June 4, 1950."

In his dissenting opinion, Judge Kaufman equated the majority's denial of transfer to a grant of summary judgment for the government and expressed his view that despite the government's factual concessions the case should be transferred so that a fuller record could be developed in the trial court (at pp. 446-447).

Jolley v. Immigration and Naturalization Service, 441 F.2d 1245 (C.A. 5, 1971), another expatriation case decided by a divided court, dealt with the question of the voluntariness of the petitioner's renunciation of citizenship. Again the majority declined to transfer the proceedings to a district court for the reason that:

> Since the facts are undisputed the presumption is inapplicable, and the question of voluntariness must be decided as a matter of law (441 F. 2d at p. 1249, fn. 5).

In *Olvera v. Immigration and Naturalization Service*, 504 F.2d 1372, 1374, 1375 (C.A. 5, 1974), the petitioner submitted no evidence to establish that he was a United States citizen at his deportation hearing. After granting one continuance of the deportation hearing, the special inquiry officer declined to grant a further continuance which had been requested by petitioner's counsel for the purpose of obtaining evidence of petitioner's citizenship. The court held that on the record there was no showing of an abuse

of discretion, and since no evidence of citizenship had been produced, there was no genuine issue of material fact as to the petitioner's nationality which would warrant transfer of the case to the district court.

Transfer of the proceedings to a district court was denied in *Maroon v. Immigration and Naturalization Service,* 364 F.2d 982 (C.A. 8, 1966) because the administrative record contained absolutely no evidence to support a claim to citizenship. The court said (364 F.2d at p. 989).

> At the hearing, petitioner testified that he did not know whether he was a citizen of the United States or of some other nation, and so could not truthfully state whether the allegation in the Order to Show Cause, to the effect that he is a citizen of Mexico, is true or false. Even in his petition for review, he makes no affirmative averment that he is a national of the United States, stating simply, "He was born on the 15th day of June, 1908, and is *of the belief* that he was born in the United States of America" (emphasis supplied by court).

It is apparent that the decision in the instant case conflicts sharply with the decisions of other circuits which have treated the statute as essentially involving summary judgment, and have thus denied transfer only where an assertion of citizenship is unsupported, or where the facts are undisputed, and considered in the light most favorable to the claimant, fail to support a finding of citizenship.

IV

REVIEW OF THE ADMINISTRATIVE RECORD BY THE COURT BELOW SHOULD NOT HAVE EXTENDED BEYOND THE DECISION OF THE BOARD OF IMMIGRATION APPEALS

In the instant case, it was improper for the court below to extend its examination of the administrative record beyond reading the decision of the Board of Immigration Appeals, the agency charged with making a final administrative decision on petitioner's claim of citizenship. It is manifest from the decision of the Board that in its view petitioner produced sufficient evidence at his deportation hearing to meet either the constitutional or the statutory evidentiary standard required for a judicial hearing. Under such circumstances, the scope of review of the court of appeals is necessarily limited to the Board's decision unless it can be demonstrated that that decision is arbitrary or totally without foundation. The Board's opinion as to the substantiality of petitioner's evidence is entitled to special respect because of the knowledge and experience it has accumulated in dealing with matters of citizenship and alienage. *Whitney Nat. Bank v. Bank of New Orleans & Tr. Co.,* 379 U.S. 411, 421 (1965); *Carpenters 46 Cty. Conf. Bd. v. Construction Ind. S.C.,* 393 F.Supp. 480, 489 (1975).

The decision below, if allowed to stand, sanctions the final resolution of petitioner's claim to citizenship by a hearing officer in the executive department where that claim " * * * involves delicate issues of credibility that could only be resolved with the benefit of

live testimony and a more complete documentary record". *Pignatello v. Attorney General,* 350 F.2d 719, 723 (C.A. 2, 1965). Petitioner derived no benefit from the appeal of the decision of the hearing officer to the Board of Immigration Appeals. That agency quite properly confined its review of the record, refusing to intrude upon the hearing officer's fact-finding function. While the majority of the panel below found petitioner's evidence not to be credible, that finding was made without hearing live testimony and without affording petitioner an opportunity to develop a more complete record in the district court. We submit that the decision below depriving petitioner of a judicial hearing on his claim to citizenship contravenes the constitutional principle enunciated in *Ng Fung Ho v. White,* supra, and violates the express terms of 8 U.S.C. 1105a(a)(5).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Dated, San Francisco, California,
November 28, 1977.

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